IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Writ Petition No.7231 of 2002

Humble Home Co-op.Hsg.Soc.Ltd. Petitioner

Vs.

1. Shri Sham Balani
2. Mrs.S.N.Shetty Respondents

Mr.V.M.Bardwaj for petitioner.
Respondent no.1 in person.
None for Resp.No.2, though served.

CORAM: B.H.MARLAPALLE,J.

June 28, 2006.

ORAL JUDGMENT:

1. This petition filed under Article 227 of the Constitution takes exception to the award passed by the Co-operative Court on 27/5/2000 in Case No.444 of 1992 and duly confirmed by the Maharashtra State Co-operative Appellate Court, Mumbai in Appeal No.136 of 2000 decided on 25/7/2002. Consequent to the award passed by the Co-operative Court on 27/5/2000 the Petitioner-Society has been directed to pay an amount of Rs.8,458/- to the disputant (Resp.No.1) along with interest at the rate of 12 % per annum.

. The disputant is the owner of flat no.11 in the building owned by the petitioner-Society i.e. Humble Home Co-operative Housing Society Ltd, Plot

No.345, Sherly Rajan Road, Bandra and the said Society is registered as a tenant co-partnership housing society within the meaning of Rule 10 of the Maharashtra Co-operative Societies Rules, 1961. Obviously the said society holds both land as well as the buildings and the individual flats have been allotted to the members by way of sale. There are in all 42 flats in one building and 13 flats in another building. Above the roof of the disputant's flat there is no flat and in fact the said roof is the terrace in its entirety and attached to flat no.13 which is owned by the present respondent no.2 who has chosen not to cause her appearance in spite of the notice from the Court as well as the notices recently issued by the learned counsel for the petitioner as well as the respondent no.1 pursuant to the oral directions of the Court. It is also not in dispute that the respondent no.2 purchased flat no.13 along with the said terrace, paid 30 per cent extra consideration for the exclusive rights over the said terrace. The Disputant's flat roof was leaking and, therefore, urgent repairs were to be undertaken. On completion of the repairs the disputant claimed reimbursement of an amount of Rs.8,458/- with interest for the repairs of the terrace as well as

the parapet walls. However, the relief in the plaint of the dispute was not limited to this recovery alone. The prayer clauses in the plaint read as under:

> "(a) This Honourable Court be pleased to decide that the private terrace of opponent no.4 is the property of Society, Opponent No.1, and Opponent No.1 be ordered to reimburse an amount of Rs.8,458/- being the 50% cost of repairs to the terrace and parapet. Further Society, Opponent No.1 be ordered to pay Rs.2009/- with interest from 1/10/1990 to 1/6/1992 and further interest upto the date of payment.
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> (b) If this Honourable Court is pleased to decide that the private terrace is the property of the flat owner, Opponent No.4, then Opponent No.1 be directed to pay the Disputant an amount of Rs.8458/- and recover the same from Opponent No.4.
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> (c) In case the Society has no funds, the Disputant may kindly be permitted to adjust

the same from the dues of the Society till whole amount is recovered. However, Opponent No.1 will pay the interest at 15% till the amount is finally adjusted.

2. The learned Judge of the Co-operative Court framed the following issues, notwithstanding the prayers as quoted hereinabove:

(1) Whether the disputed terrace is the property of the Society or it is the private property of Opponent No.4?

(2) Whether disputant is entitled for the reimbursement of the amount of Rs.8,458/- being proportionate cost of the repairs?

(3) What order?

3. The first issue has been answered by holding that the terrace which forms the roof of the disputant's flat is the property of the society and, therefore, in reply to issue no.2, the society has been directed to pay an amount of Rs.8,458/-. The learned Judge of the Co-operative Court considered

the scheme of Bye-law No.162 and proceeded to hold that the terrace, though was part of the flat no.13, is the property of the society and the said findings of the Co-operative Court have been confirmed by the lower Appellate Court.

4. The disputant Mrs.Lata Balani in her depositions before the Co-operative Court as part of the examination-in-chief stated:

> "...Building No.1 has common terrace while terrace of Building No.2 is divided into four parts, out of that two portions are attached to the flat on 3rd floor. I am staying in 2nd floor and above my flat there is terrace, which is the part of flat no.13 occupied by opponent no.4.

In her cross-examination she admitted as under:

> "It is true that water tanks of the building are situated on the terrace of the society. I cannot go to the terrace of the society because it is the property of the society. I cannot go to the terrace (open) attached to

> flat belonging to Mrs.Shetty because it is owned by her. The terrace owned by Mrs.Shetty is different than the terrace on which water tanks are situated. It is true that Mrs.Shetty has paid 30 % extra cost to have the terrace attached to her flat ... ... My property means my flat no.11. It is true that nobody can enter into my flat without the permission of myself and my family members. It is true that I have exclusive right in respect of my flat and hence nobody can enter in my flat without my permission. It is correct that Mrs.Shetty has paid consideration and extra 30 % price for purchasing terrace attached to her flat. It is true that terrace attached to the flat of Mrs.Shetty is the property owned by Mrs. Shetty."

. However, the disputant claimed that in spite of ownership of Mrs.Shetty over the terrace, the terrace is the property of the society like the flats and the Courts below were swayed in this regard. Both the Courts failed in appreciating the fact that though both the buildings along with the open land and roads etc. were owned by the society, the individual flats were sold to the concerned occupants

and the flats were their exclusive property which could be sold to any other person by such owners by obtaining no objection certificate from the society. The society was not required to be a confirming party for such transactions and it had no right over the ownership of individual tenements. It was, therefore, not necessary for the Co-operative Court to consider the prayer for deciding the ownership of the terrace and the claim of the disputant was required to be considered by reading the provisions of bye-law no.162 and on the plea that the claim was for the repairs of roof top and parapet walls. The Co-operative Court entered into an arena which it was not necessary to adjudicate in deciding the disputant's claim for reimbursement of Rs.8,458/- from the society.

5. It was necessary for the Co-operative Court to understand that all that the disputant was claiming was reimbursement of repairs to the roof of his flat and not to the terrace. In addition the claim was in respect of the repairs to the parapet walls. This is required to be done by the society irrespective of whether the leakage is through any flat or through any terrace if regards be had to the scheme of bye-law no.162. The said bye-law reads as under:

"162. The following repairs and maintenance of the property of the society shall be carried out by the society at its costs:

(a) (i)..., (ii)..., (iii)..., (iv)..., (v)..., (vi)..., (vii)..., (viii)...,

(ix) terrace and parapet walls

(x) roofs of flats,

(xi)..., (xii)..., (xiii)..., (xiv)..., (xv)...,

(xvi) lifts, if any. Roofs of the flats and damaged ceiling and plaster thereon in the top floor flats on account of the leakage of the rain water through the terrace.

(b) All the repairs, not covered under bye-law No.162(a) shall be carried out by the members at their cost.

. It is also pertinent to note that on or about

9th December 1992 clause (a) of bye-law no.162 was expanded by following additions:

> "Roofs of the flats and damaged ceiling and plaster thereon in the top floor flats on account of the leakage of the rain water through the terrace."

This additional portion had nothing to do with entry no. (x) in clause (a) of bye-law no.162. The claim made by the disputant was squarely covered in terms of clauses (ix) and (x) of clause (a) of bye-law no.162. It is not disputed by any of the parties that the repairs were to the parapet walls and the roof of the flat i.e. flat no.11 owned and occupied by the disputant. The claim of ownership of the terrace above the roof of the flat no.11 was irrelevant and it was not required to be adjudicated. The society is required to pay for the repairs of parapet walls and the roof of the flats as well. The expansion of clause (a) to bye-law no.162 by amendment in 1992 is for a specific purpose and it in no way affects entry no.(x) as it originally stood.

6. The disputant herself was fully aware about

the ownership rights of the terrace and she raised additional issues for adjudication which were not relevant for deciding her claim and more so when she admitted that the terrace was owned by Mrs.Shetty, she had no scope to claim the reimbursement for repairs of the terrace from the society. Therefore, it was necessary to read her case as the claim for repairs of parapet walls and roof of her flat.

7. In the premises, this petition partly succeeds and the findings recorded on issue no.1 by the Co-operative Court and confirmed by the lower Appellate Court are hereby quashed and set aside and in any case the ownership of the terrace was irrelevant to the disputant's claim. The recovery of Rs.8,458/- from the society and in favour of the disputant is hereby confirmed with interest as directed by the Co-operative Court. Rule made partly absolute in terms of the above directions but without any order as to costs.

(B.H.MARLAPALLE,J.)